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RISK, MILITARY ETHICS AND IRREGULAR WARFARE

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PROLOGUE

A US Army Non-commissioned officer reported in a letter to commentator George Will that during one patrol his unit came under heavy small arms fire and rocket propelled grenades (RPGs). In response, he requested artillery be fired on the enemy's position. His higher headquarters denied the request because of the proximity of Afghan civilians to the fighting. Unable to continue the mission, he requested the supporting artillery unit to fire smoke rounds to conceal the unit's movement out of the engagement area. The headquarters granted this request but even though the chances of injury from a smoke round are remote, the artillery unit had to deliberately fire one kilometer off the requested position for fear of injuring civilians. As result, the rounds were ineffective at concealing the unit's movement.¹

In another example, a higher headquarters denied a Marine patrol permission to attack an apparent insurgent group emplacing roadside bombs in Afghanistan. The Marines not only observed that the Afghans possessed equipment associated with improvised explosive devices (IEDs), they had also recently intercepted a radio transmission indicating insurgents were planting such devices in the area. However, since the insurgents were planting the IEDs in an area close to civilian populations and the only way the Marines had available to intervene--machine guns and helicopters--would have almost certainly caused collateral damage, the higher headquarters denied their request to attack the insurgents. Frustrated, the lieutenant in charge angrily exclaimed, "I thought we were going to play by big boy rules."²

Had they been playing by the traditional rules, the sergeant would have received supporting fire and the Marines would have been permitted to fire on the insurgents, even if both courses of action meant risking noncombatant casualties. As long as they did not target noncombatants and used just the amount of force necessary to break contact and kill the insurgents planting the IEDs, their request for additional fire-power would be within the scope of traditional military ethics. In fact, this emphasis on preventing collateral damage in many of the counter-insurgent fights in Afghanistan and Iraq has drawn a great deal of criticism precisely because of the excessive risk soldiers are often called upon to bear.³

INTRODUCTION

Soldiers, of course, are called on to bear risk in service to the country. In fact, bearing that risk is an important part of the Soldier's identity. In 2000, Don Snider, John Nagl, and I wrote a monograph on Army professionalism that argued this point, noting that, in part, risk-taking is an inherent and essential part of what it means to be a soldier.⁴ Written in the context of "radical" force protection policies in place during peacekeeping operations in the Balkans, we argued that such policies not

¹ George Will, "U.S. tactics in Afghanistan put troops at risk," Washington Post, 21 June 2010.

² Tom Bowman, "Rules of Engagement Are A Dilemma for US Troops," Interview on National Public Radio, December 11 2009.

³ Ralph Peters, "The Rules Murdering our Troops," *New York Post*, 25 September 2009, http://www.nypost.com/p/news/opinion/opedcolumnists/item_u935ECKNWxpLK8C5D96pdN (accessed 8 October 2011).

⁴ Snider, Don, Major Nagl, John, Major Pfaff, Tony. *Army Professionalism, the Military Ethic, and Officership in the 21st Century*. Carlisle, PA: Strategic Studies Institute, 1999. For the purposes of the project, I will use the term "soldier" to refer generically to uniformed members of the military. I will capitalize "Soldier," "Sailor," and "Airman" when referring to uniformed members of the Army, Navy, and Air Force just as one would capitalize "Marine" when referring to uniformed members of the U.S. Marine Corps.

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only undermined soldier effectiveness, they were also immoral. Forcing the choice between undertaking missions and accepting personal risk forced soldiers to place that risk elsewhere: either noncombatants or the mission. Radical force protection policies forced them to place it on the mission, which they did not undertake if there was the possibility of harm to themselves. This situation effectively turned soldiers into technicians and bureaucrats—a situation just as absurd as the excessive risk taking described above.

What we did not fully discuss in that paper was the central role decisions about risk play in military ethical decision-making. Traditional military ethics⁵ accepts that soldiers have a reasonable interest in taking the least risk possible when conducting operations. However, when that risk is transferred to noncombatants, these same ethics require soldiers to observe the constraints of proportionality and discrimination to limit how much risk they transfer. In this view, assuming extra risk on the part of soldiers is obligatory, at least up to the point of mission failure. Since the limits of risks are identified with the requirement to accomplish missions, preserving lives of soldiers is experienced more as a concession to the requirements of military necessity and not an obligation itself.

By conflating preserving soldiers' lives with military necessity the traditional view of military ethics sets up a false dilemma where one must choose between non-combatant lives, which have value, and soldiers' lives, which do not, at least not apart from military necessity. It is no wonder that many soldiers see ethical decision making in war-time as the application of abstract principles, divorced from the realities of fighting and winning those wars. This abstraction is especially apparent in irregular warfare, where the separability of civilian and military targets that underpins the traditional view, blurs.

The traditional view requires Soldiers to always subordinate their lives to accomplishing the mission and avoiding harm to noncombatants (friendly or enemy) when choosing where to transfer risk. This dynamic denies soldiers their right to life and absolves the state of its obligations to protect all its citizens. In the context of irregular warfare, where civilians and civil society are increasingly inseparable from war fighting, this subordination forces combatants to assume all the risk since transferring it to civilians is co-extensive with transferring it to the mission. Resolving the absurdity requires reframing the problem. Rather than conceiving military ethical decisions as the observation of restraints on the use of force to meet obligations toward enemy civilians, the central question of military ethics is better described as where does one place risk in the face of certain threats: combatants, non-combatants, or the mission.

THE TRADITIONAL VIEW: MILITARY NECESSITY AND PROPORTIONALITY

Military ethics begins with the utilitarian imperative to accomplish missions. The logic is fairly simple. If one's cause is just, one maximizes the good by achieving it. Thus, actions that lead to victory or avoid defeat are not just permissible; they are obligatory. Given the state's moral obligation to protect its citizens,⁶ military operations conducted in their defense are *prima facie* obligated, even when conducting those operations exposes combatants to harm.⁷ Thus, in what I will refer to as the "traditional view," by taking on the role of soldier, one assumes the state's obligation to protect its citizens. By taking on that obligation, one further assumes the associated risks, including the risk of death.

On the surface, military necessity would appear to permit combatants wide latitude in mitigating risks to themselves. Military necessity only requires them to choose courses of action that maximize the chances for victory and minimize the chances of defeat. Since preservation of soldiers' lives is obviously closely linked to an army's ability to wage war, the utilitarian ethics of military necessity would seem to permit soldiers to transfer almost all the risk of war fighting to the enemy—including enemy civilians. This permission, of course, would only hold if transferring risk to civilians were the best way to achieve the military objective. However, given the obvious and close correlation between preserving combat power and battlefield success, it would be difficult to question the judgment of a commander who chose the least risky course of action on the basis of military necessity.

It is important to note that military necessity would also require soldiers to transfer additional risk to themselves if that were the best way to accomplish the mission at hand. In fact, many examples of current counter-insurgency (COIN) doctrine require very little—if any—transfer of risk to noncombatants for fear of undermining efforts to win "hearts and minds."⁸

⁵ For the purposes of this paper, I will consider the "Traditional View" of military ethics as roughly synonymous with the "Just War Tradition," especially as articulated by Michael Walzer in *Just and Unjust Wars*.

⁶ Eric Patterson, *Just War Thinking*, (New York: Lexington Books, 2007) 47. Common throughout social contract theories is the idea that it is in the interest of the individual to cede certain rights to a sovereign who is capable of and responsible for maintaining the order necessary to sustain cooperative civil society. Maintaining that order, says Patterson, is the "fundamental social contract—security for acquiescence to authority."

⁷ James M. Dubik, "Human Rights, Command Responsibility, and Walzer's Just War Theory," *Philosophy and Public Affairs* 11, no. 4 (1982): 355. Dubik rejects Walzer's conception that soldiers give up their right to life in order to gain the right to kill. He argues that if rights to life and liberty are indeed natural then soldiers—or anyone for that matter—cannot give them up.

⁸ ISAF Commander's Counterinsurgency Guidance (Headquarters, International Security Assistance Force Kabul Afghanistan, 2009) 2. According to the assessment, "The intricate familial, clan, and tribal connections of Afghan society turns "attrition math" on its

Thus, in regard to risk, military necessity requires only that the commander take into account operational considerations that maximize the chances of mission success or minimize the chances of mission failure. What it does not require is that he take into account combatant or non-combatant lives beyond how they influence those operational considerations. Thus military necessity permits significant transfer of risk to enemy noncombatants.

It is worth noting, however, that it does not permit the total transfer of risk. The utilitarian nature of military necessity rules out courses of action whose outcomes result in more harm than good. This restriction, referred to as *proportionality*, requires soldiers to limit the harm to civilians and civilian infrastructure they cause relative to the value of the military objective. The value of the military objective is measured against its contribution to the moral objective of war: to establish a better state of peace than the *status quo ante bellum*.⁹ Thus indiscriminate (or even insufficiently discriminate) acts would be usually be unjustified because the harm they cause undermines the chance for a stable peace

Because the proportionality requirement restrains the amount of force soldiers are permitted to use, it entails soldiers must take additional measures to limit the transfer of risk to noncombatants. To the extent those measures impede mission accomplishment, soldiers are then obligated to assume that risk themselves. Generally speaking, soldiers will prefer to use weapons that maximize the distance between them and the target in order to lower their exposure to enemy fire. The greater the distance, the less certain friendly forces can be regarding specific locations of enemy troops. Therefore, greater force, usually in the form aerial or artillery bombardment, is required to destroy those enemy forces. Advanced surveillance equipment such as satellites or unmanned aerial vehicles can overcome some of this uncertainty. Further, precision-guided munitions can limit to some extent the amount of force required. However, as combat from Iraq to Afghanistan to Gaza has shown, these weapons cannot resolve uncertainty to the same degree that boots on the ground can. Thus given the requirement to restrain force, combatants may have to expose themselves to greater risk in order effectively attack the enemy objective.

Still, this level of risk is fairly low and military necessity permits the transference of a great deal of risk to noncombatants. Given the difficulty in placing a specific value on a particular objective or the cost to noncombatant lives in advance of the operation, soldiers in all but extreme cases can reasonably argue that as long as they observed some restraint and took some risk, they met the conditions specified by military necessity and proportionality.

DISCRIMINATION AND NON-COMBATANT IMMUNITY

The traditional view also requires soldiers to discriminate between legitimate and illegitimate targets when employing force. This requirement also typically draws its justification from the state's obligation to protect its citizens from harm. Most traditional views of military ethics define war in terms of some violation of a state's political sovereignty or territorial integrity.¹⁰ These "states rights" are not themselves morally worth defending, but derive their value to the extent their preservation secures the rights of citizens to life and liberty. Because these rights are universal, they apply equally to friendly and enemy noncombatants and restrict the kind of harms soldiers may commit. This restriction, referred to as noncombatant immunity, requires soldiers to intend not to harm noncombatants when employing force against otherwise legitimate military targets.

Discrimination does not, however, directly entail a requirement to assume additional risk beyond what is required to accomplish the mission. What requires soldiers to assume such additional risk are those instances where efforts to discriminate will be imperfect and that no matter how precise combatants try to be, noncombatants will be harmed. In those instances, soldiers must take additional measures to mitigate the risk to noncombatants, even if that means assuming additional risks themselves.

To illustrate this point, Walzer cites as an example the efforts of a Soldier in WWI whose mission was to clear cellars of enemy combatants in a recently seized urban area. In doing so, he took the additional measure of shouting out a warning in order to give noncombatants the opportunity to identify themselves and thus avoid harm. Walzer's point here is that it is not sufficient to simply not intend to harm noncombatants; rather, one must intend *not* to harm noncombatants.¹¹ Had the Soldier simply not intended to harm noncombatants, then he would have been under no obligation to provide a warning. However, simply throwing grenades down cellar doors hardly seems like an act of discrimination, whatever the he might have intended. Thus, even though giving such a warning would give enemy soldiers time to react and place him at greater risk, he was obligated to offer it anyway. Georgetown professor Dave Luban articulates the objection this way:

head. From a conventional standpoint, the killing of two insurgents in a group of ten leaves eight remaining: $10 - 2 = 8$. From the insurgent standpoint, those two killed were likely related to many others who will want vengeance."

⁹ Michael Walzer, *Just and Unjust Wars*, 2nd ed (New York: Basic Books, 1992) 119-120. Because the immediate, short-term, military objectives are embedded in the larger, overall military objective, proportionality calculations apply to both. But when it comes to the more limited, short term objectives, proportionality must be calculated in terms of its contribution to that objective, not in terms of the value of the overall objective.

¹⁰ Walzer, 53-54.

¹¹ Walzer, 101-108, 151-153.

“Knowing that an attack will hit both military and civilian objects, the soldier must take care to intend only to hit the military target, not the civilians. That seems like an absurd and dishonest mental game. How do you avoid war crimes? Close your eyes, take a deep breath, concentrate hard, and refocus your intentions. Then go ahead and do what you were going to do anyway.”¹²

To avoid absurdity and dishonesty one must take action to discriminate, even if that requires additional risk. Of course, as noted above, that risk is still limited by the fact combatants are not obligated to conduct operations in a way they will knowingly fail or not be able to continue the fight. But even this limitation will not resolve the absurdity the excessive risk taking described by the NCO and Marine lieutenant above.

DIFFICULTY FOR THE TRADITIONAL VIEW

Given the standard view, it is not hard to see why the NCO's and Marine lieutenant's higher headquarters withheld supporting fires and smoke as well as the permission to attack the insurgents planting IEDs. Military necessity demands concern for the mission. The application of proportionality and discrimination, however, demand concern for noncombatants. While commanders are expected to conserve soldiers' lives as a matter of military necessity, the demands of irregular warfare—where support of the local population is critical to mission accomplishment—place almost all the risk associated with conducting operations onto the soldier.

The difficulty for the standard view is that when choosing where to transfer risk—mission, enemy civilians, or themselves—combatants must always choose to transfer risk to themselves, except when the mission itself is at stake. By placing friendly combatants lowest in priority in terms of risk avoidance, one effectively denies them the right to life. By denying them the right to life, they are denied the protection of the state they are defending. This view is explicitly held by Walzer who notes:

“The immediate problem is that soldiers who do the fighting ...lose the rights they are supposedly defending. They gain war rights as combatants and potential prisoners, but they can now be attacked and killed at will by the enemy. Simply by fighting ... they have lost their rights to life and liberty ... and they have lost it, even though, unlike aggressors states, they have committed no crime.”¹³

Israeli philosopher Asa Kasher has famously challenged this feature of the traditional view. In an article co-written in 2005 with then Major General Amos Yadlin, Kasher remarked: “the duty to minimize casualties among combatants during combat is last on the list of priorities ... we reject such a conception because it is immoral.”¹⁴ The authors argued that the state's obligation to protect its citizens from harm—which justifies the use of force in the first place—extends also to soldiers. While recognizing that soldiers do assume risks friendly civilians do not, they argue that soldiers still retain their rights to life. The state may be justified in putting his life at risk because of its obligation to defend all citizens, but the obligation to protect the soldier to the extent commensurate with his duties does not go away.

Further, the authors argued that the state has no such obligation to protect enemy noncombatants, especially if it means assuming additional risk on the part of friendly combatants. While they agree that enemy noncombatants may not be directly targeted, they argue it is immoral to ask friendly combatants to take additional risks to protect those civilians outside the state's effective control. This restriction follows from the fact that the social contract forbids the state from jeopardizing the lives of its citizens unless it serves the defense of other citizens. In their formulation, minimizing injury to the friendly noncombatants is a higher moral priority to a military than minimizing casualties to its own troops. However, force protection is a higher priority than minimizing casualties to enemy civilians not under the military's control.

This view was apparently influential in shaping the way the Israeli Defense Forces (IDF) conducted operations in Gaza in 2009. According to press reports, Israeli soldiers were told to “protect themselves first, civilians second.” According to one report, if they “are told to reach an objective, they first call in artillery or airpower and use tank fire.”¹⁵ Such tactics minimized the risk to soldiers, but also limited their ability to discriminate among targets, which typically increases the risk to non-combatants. Given that more than 1300 Gazans reportedly died in the conflict,¹⁶ it seems that these practices did represent a significant transfer of risk to the noncombatants, which would have only been permitted under the traditional view had the IDF taken whatever measures they could to discriminate up to the point of mission failure.

¹² David Luban, “Risk Taking and Force Protection,” *The Scholarly Commons*, (Washington, DC: Georgetown University Law Center, 2011) 8-9.

¹³ Walzer 136.

¹⁴ Asa Kasher and Amos Yadlin, Military Ethics of Fighting Terror: An Israeli Perspective. *The Journal of Military Ethics*, April 2005, Vol 4, Issue 1, 17. Kasher, 17.

¹⁵ Steven Erlanger, “A Gaza War Full of Traps and Trickery,” *New York Times*, 10 January 2009.

¹⁶ Bethany Bell, “Counting the Casualties of War,” *BBC Online*, 28 January, 2009, http://news.bbc.co.uk/2/hi/middle_east/7855070.stm (accessed 9 October 2011).

The difficulty with Kasher and Yadlin's view is that it privileges nationality (or at least residence) when determining where the burden of risk should lie. They argue that what determines the state's obligation to protect—or at least avoid harm—is whether the state has effective control over the territory in which the combat operations are taking place. If the state has effective control, then it has sovereignty over that territory. If the state claims that right to sovereignty, then it must respect the rights to life and liberty that justify that claim to sovereignty in the first place. Respecting those rights includes exercising that sovereignty to protect those persons under its control, which is the fundamental feature of the social contract. Where the state does not have sovereignty, then it has no obligation to protect.

To illustrate why the absence of sovereignty does not entail the absence of the obligation to avoid harm, Walzer and Avishai Margalit described a situation where Lebanese Hezbollah (LH) forces capture an Israeli kibbutz. They described four different scenarios where the IDF is confronted with liberating the kibbutz. In one scenario LH is holding Israeli citizens hostage and using them as human shields. In this case, under Kasher and Yadlin's model, preserving the lives of IDF personnel would come second to preserving the lives of the civilians thus limiting the amount of risk they could transfer to either the mission or to the noncombatants.

In the next scenario, there are a number of "well-wishing volunteers"—supportive pro-Israeli non-nationals. Though not Israeli citizens and though not in territory effectively under government control, Walzer and Margalit argue that it seems intuitive that their nationality should not weigh against them when soldiers determine where the burden of risk should lie. They should assume the same additional risk they would provide the Israeli citizens the volunteers support.

They then alter the scenario and rather than hostages, the kibbutz is populated by anti-Israeli protestors from abroad. Here the only thing that distinguished this population from the previous population was their attitude towards Israel. However, this discriminating criterion would not be applied to the population of Israeli citizens. Had the Israeli citizens in the first scenario been supporters of LH rather than hostages, the obligation to take extra risks would still be in place. In Kasher and Yadlin's view, it would not matter if the Israeli citizens in the kibbutz supported the LH who had taken over, the soldiers' obligation to protect them would still hold.

The next scenario involved Lebanese citizens who were bussed in to act as human shields. In this case, they do not support the LH or Israel. They just simply want to return to their lives in Lebanon. Here again, the only thing that distinguishes this population from the ones for which additional risk would be obligated is their nationality.

In the first case, the rules the IDF already plays by – soldiers assume additional risk in order to protect friendly civilian lives. In the second example, it seems counter-intuitive to argue these pro-Israeli supporters enjoy less consideration than the Israelis under similar circumstances. If neither nationality nor presence under effective control affect decisions about risk in the first two examples, then it is not clear why they should in the latter two, since these cases are differentiated only by attitude toward Israel. As Walzer and Margalit note:

“(b)y wearing a uniform, you take on yourself a risk that is borne only by those who have been trained to injure others (and to protect themselves). You should not shift this risk onto those who lack the capacity to injure; whether they are brothers or others. The moral justification for this requirement lies in the idea that violence is evil, and that we should limit the scope of violence as much as possible. As a soldier, you are asked to take an extra risk for the sake of limiting the scope of war.”¹⁷

Here we have a clash of intuitions. Walzer and Margalit are right: liability to attack depends on the threat one represents, not one's nationality or residence. But Kasher is also right: soldiers do have a right to life and an expectation that the state will take measures to protect them as well.

So, while the imperative to accomplish missions obligates soldiers to take risks, a broader view of military ethics must also consider the obligation the state has to preserve their soldiers' lives and well-being. The standard view cannot accommodate both these intuitions. Thus we must either continue to require Soldiers to bear all the risks of war fighting or revise the standard view.

IRREGULAR WARFARE AND RISK

In the kinds of conventional wars that gave rise to the rules associated with the standard view, the risk is largely manageable. As noted before, soldiers are not required to assume so much risk that the mission fails or that they would not be able to continue the fight. This limitation provides commanders sufficient latitude to balance mission requirement and soldiers' lives because it gives them somewhere else to displace the risk associated with a particular operation. While they are not permitted to directly target noncombatants, they can construct the operation to take advantage of long-range fires and other protective

¹⁷ Avishai Margalit and Michael Walzer, "Israel: Civilians and Combatants," *The New York Review of Books*, May 14-27, 2009, Vol LVI, Number 8, 22.

measures, even if that means displacing some risks to noncombatants.

However, because of the close association between the support of the local population and victory, displacing that risk onto noncombatants in irregular warfare often places the mission at risk.¹⁸ Further, irregular adversaries' ability to mask their presence among the population gives them an advantage over forces that cannot. This same ability allows them to distinguish opposing forces, which further places those forces at a disadvantage. This asymmetric ability to distinguish one's foe not only offsets the advantages associated with soldiering, it ties that offset to the presence of civilians on the battlefield.

Thus it is not simply the case that support of local populations is critical to winning irregular wars; rather, it is the case that the population represents a contribution to enemy capability. The fact that irregular adversaries can hide among the population while at the same time targeting counter-insurgent forces, suggests that the presence of civilians has a direct and positive impact on the enemy's ability to fight. Additionally, when it is the case that civilians actively support the insurgent cause, that connection to enemy capability is further entailed. Thus in irregular warfare, civilians' contribution to the enemy's ability to wage war is not easily separated.

It is this close connection coupled with the requirements of the traditional view that place soldiers in the absurd positions described above. To avoid such absurdities, what is required is a view of military ethics that permits commanders to displace risk on something other than soldiers while at the same time upholding the principles of proportionality and discrimination as articulated above.

Because civilians and civil society are closely linked with the enemy's ability to fight, it makes sense that some of the risk associated with that fight should be transferred to them, at least when the choice is transferring it all to friendly combatants. However, arguing that civilians should bear risk because of their central role in determining enemy combat capability does not necessarily entail greater permissions for soldiers to conduct operations in such a way civilians would be harmed. Kasher and Yadlin are right, the state has an obligation to protect all its citizens, including soldiers. But Walzer and Margolit are also right: the state should not implement such protection in a way that violates the rights of noncombatants: friendly or enemy.

Thus, the question to answer when determining where the burden of risk should lie is: how would we handle that threat if it manifested within our own populations? Looking at military ethical situations this way requires us to reframe the problem from the simple application of rules associated with military necessity, proportionality, and discrimination to balancing risk in a way that respects the rights of combatants and noncombatants alike.

RESOLVING THE MORAL PROBLEM: ENEMIES AND CRIMINALS

When enemy combatants and civilians are difficult to separate in the manner described above, it is often because there some sort of order that supports the activities associated with civil society. In conventional combat zones that order is typically suspended as combatants wrestle over who controls that particular piece of land. However, insurgencies usually take place in the context of a larger social and political order to which the insurgents either object or exploit and which counter-insurgent forces are presumably trying to defend. In fact, these sorts of irregular conflicts are not so much about destroying a particular order, but gaining control over it.

This point suggests we have to reconsider what sort of adversary irregular adversaries are. Rather than an existential threat to the state, they are an existential threat to the citizens of the state. This distinction is important. In the kinds of conflicts represented by Iraq, Afghanistan, and Gaza the immediate threat is not to the state but to its citizens. However, the standard view rests on the idea that war is only justified in the face of an act of aggression defined as a violation of political sovereignty and territorial integrity. That kind of aggression, however, is not what soldiers typically confront in irregular warfare. In these conflicts their aim is to maintain a particular order, not destroy it.

Over time this could of course change. And when it does, the sort of ethics reflected in the standard view would be appropriate. However to the extent irregular adversaries represent a threat to individual rights but not the corresponding state's rights, they are then best conceived as criminal. While they do not directly threaten those state's rights, their threat to individual rights still places a burden on the state to protect them.

In 2001, I argued in the monograph *Peacekeeping and the Just War Tradition*, that the distinction between war fighting and law enforcement was essential to understanding soldiers' ethical obligations in irregular conflicts. This distinction is well-captured in the actions of a joint police-military patrol undertaken during the 1992 Los Angeles riots, where Marines and police responded to a domestic disturbance. When they arrived at the apartment where the disturbance occurred, the police knocked on the door and announced themselves. The response was a shotgun blast through the door that fortunately missed

¹⁸ Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (New York: Alfred A. Knopf, 2007), 281. As retired British general Rupert Smith noted in *The Utility of Force*, in such conflicts, the loyalties, attitudes, and quality of life of the people do not simply impact the outcome they determine it.

the officers. As the police readied to enter the room, they yelled to the Marines, “Cover me!” In response, the Marines fired approximately 200 rounds through the door. Fortunately, no one was injured.¹⁹

Though both military and law enforcement organizations instruct their forces to always use the least force necessary, this example shows they have very different conceptions of what necessity entails. In the police view, it would be better to develop the situation and ascertain whether there were nonviolent ways to resolve it. As far as the Marines were concerned, any degree of proportional force that eliminated the threat would be appropriate, even if it put civilians at some risk.

The different reactions are due to the way each perceives and is trained to deal with threats. To the police, the threat is a criminal they must apprehend in order to minimize disruption to society. Since the use of violence represents a further disruption of the peace, police are always looking to use the least force possible. But soldiers are trained to defeat enemies, who must be killed—or at least captured—if there is to be peace. They are always looking to use the most force permissible.

These different models provide soldiers with different conceptions of the use of force they can employ to meet their obligations to the mission, noncombatants, and themselves. By understanding there is more than one context in which to apply military force, we reframe the problem. Rather than simply asking what the rules permit, we ask first how do these rules apply given the relevant concept of necessity. In this view, military necessity, proportionality and discrimination still matter but their application changes depending on whether the most force permissible or the least force possible applies. When that context changes, it is not the rules that change, simply where the burden of risk lies. Further, this view allows us to recognize that force protection is itself a moral obligation that commanders must consider when determining that burden of risk.

The following are revisions to military necessity, proportionality, discrimination, and force protection suggested by this analysis.

Proportionality: When calculating proportionality, soldiers fighting wars are required to weigh the value of the military objective and the harm done to achieve it against establishing a better state of peace following the cessation of hostilities. Soldiers combatting irregular adversaries, on the other hand are obligated to weigh their actions arm against the requirements to maintain, if not strengthen, the current order. This point means that soldiers must not only consider the consequences of the violence they may employ, but also of non-violent actions that nonetheless disrupt the peace, such as mass detentions or excessive restrictions on movement.

Non-combatant Immunity: When discriminating against legitimate and illegitimate targets, soldiers fighting wars must intend to not harm non-combatants. However, as long as they take actions to limit that harm, they are still permitted to act, even if they know some civilians may be harmed. Soldiers combatting irregular adversaries, however, must further intend not to place civilians at risk. This point does not suggest that police are never permitted to undertake actions where civilians may be harmed. For example, they may undertake a high-speed car chase even though there is always the chance that they may lose control of the car and inadvertently harm a civilian. The difference here is that the harm is not only unintended, it is unforeseen.

Additionally, as Kasher and Yadlin would have to argue, as soldiers gain more control over the ground they occupy, they take on the obligation to protect civilians from harm in the same way police do.²⁰ This latter condition assumes that soldiers can act as police in the given area of operations. Clearly, Hamas’s control over Gaza prohibited the IDF from doing that. In such cases, soldiers may engage the adversary under the enemy model, but only in order to establish a law enforcement capability as rapidly as possible.

Force Protection: As noted earlier, soldiers fighting enemies are obligated to take risks to minimize harm to non-combatants, though these risks are limited by the requirements of force protection and mission accomplishment. This obligation to accept risk also holds in irregular conflicts. However, when fighting irregular adversaries, soldiers are limited in how much risk they can transfer to noncombatants by the requirement to preserve the peace. This point does not suggest that soldiers are obligated to go on suicide missions. It does mean if the choice is to forego harming civilians or undertaking a particular course of action, soldiers must choose to forego that course of action. This point does not suggest that they must forego achieving their objective; just that they must find another way to do it. Police, for example, would let a criminal, even a violent one, escape before firing into a crowd of civilians. They would not, however, stop their pursuit of that criminal nor their efforts to prevent future criminal acts.²¹

¹⁹ James D. Delk, *Fires & Furies: The LA Riots*, (Palm Springs, CA: ETC Publications, 1995). Quoted in Christopher M. Schnaubelt, “Lessons in Command and Control from the Los Angeles Riots,” *Parameters* 27, (Carlisle, PA: US Army War College, Summer 1997) 1

²⁰ Paolo Tripoldi, “Peacekeepers, Moral Autonomy, and the Use of Force,” *Journal of Military Ethics*, Vol 5, No. 3, 2006, 217

²¹ John Kleinig, *The Ethics of Policing*, Cambridge: Cambridge University Press, 1996, Chapter 1. In most jurisdictions in the United States, police would be prohibited to attempt to kill a violent criminal if bystanders would knowingly be harmed. This is true

CONCLUSION

By viewing military ethical decision-making through the lens of balancing risk as opposed to simply applying rules, we can resolve the conundrum created by the application of the standard view in non-standard combat environments. Further, we can do so and still respect the basic rights the standard view attempts to uphold.

In resolving the conundrum, it is important to be clear that it does not follow from this analysis that noncombatant casualties are never permitted when fighting irregular warfare. What follows is that when determining how best to accomplish military objectives soldiers must always prefer those actions that avoid risk to noncombatants. This preference is required to uphold the civil order soldiers are trying to defend. When they cannot avoid that risk, they are permitted to act, but must take extra measures to limit that risk to noncombatants, just as in regular warfare they must take extra measures to limit harm.

In this view, then, the NCO should have received accurately placed smoke to allow him to break contact. The chance of harm from a smoke round is so limited that it is reasonable to argue that any risk, much less harm, is unforeseen. The Marine Corps lieutenant would probably not have been permitted to engage the insurgents planting the IEDs with machine gun fire and helicopter gunships just as police would not be permitted to fire into a crowd, even if they knew that would prevent a violent crime.

What he should have the option to do is kill or detain the insurgents if he can do so without placing civilians at risk. Additionally, he should also have the option to avoid running convoys where the IED is planted until it could be safely dismantled. Just because he is not permitted to place risk on noncombatants does not mean his Marines have to accept that risk as well. He should be permitted to reconceive the mission so that the ultimate end—strengthening the order represented by the Afghan government—is achieved.

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